I therefore hold that the plaintiffs did not waive their claim for the shortfall. Neither was there merger in view of the provisions of cl 21 of the sale and purchase agreement which reads:

> Notwithstanding completion of the sale and purchase herein the terms and conditions of this agreement shall remain in full force and effect as between the vendor and the purchaser in so far as the same are not fulfilled.

On compensation for the shortfall, the unit was sold for $160,000 with an estimated area of 458 sq ft. This works out at $349.35psf. I therefore allow abatement in the purchase price at $349.35psf of the shortfall. Judgment is accordingly given in favour of the plaintiffs with costs.

The defendants raise the possibility of the shortfall being due to the demolition by the plaintiffs of the partitioning wall between G31 and G29. In that event there would be a corresponding increase in the floor area of G29 which also belongs to the plaintiffs. I discount this possibility but nonetheless I add a rider to the effect that in working out the amount to be abated, the excess, if any, in the actual floor area of unit G29 over the floor area stated in the sale and purchase agreement for unit G29 should be taken into account and the shortfall in G31 offset against the corresponding excess if any in G29.

*Application allowed.*

Solicitors: *Shook Lin & Bok; Ong Tay & Partners.*

Reported by *Terence Tan Bian Chye*

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## Chai Chung Ching Chester & Ors v Diversey (Far East) Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 86 OF 1991
GOH PHAI CHENG JC
29 APRIL 1991

*Civil Procedure — Bill of costs — Taxation of — Construction of settlement agreement and consent order — Admissibility of extrinsic evidence — Whether professional fees paid part of damages or cost — Evidence Act (Cap 5, 1970 Ed), ss 93 & 94*

*Words and Phrases — 'Claims in the suit'*

Diversey (Far East) Pte Ltd ('Diversey') in Suit No 5626 of 1986 sued the plaintiffs for an injunction to prevent them from using or divulging Diversey's trade secrets or dealing with Diversey's trade suppliers and for damages for conspiracy to defraud. The dispute was settled prior to the trial in a settlement agreement dated 8 September 1989 ('the agreement'). Under the agreement, the plaintiffs agreed to pay the sum of $400,000 to Diversey in consideration of Diversey releasing them from 'all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date (of the agreement) including but not limited to the claim in the suit'. A consent order recorded most of the contents of the agreement made.

Both under the agreement and the order of court, Diversey was entitled to taxed costs on a party and party basis. When Diversey presented its bill of costs for taxation, the plaintiffs objected to the inclusion of two items therein, viz the sums of $60,024 and $57,136.44 being professional fees paid to Coopers & Lybrand and to Commercial Trademark Services (Far East) Pte Ltd and Lionel Security Services Pte Ltd, respectively. An application to determine the construction and ambit of the agreement and consent order was, pursuant to the direction of the assistant registrar, taken by the plaintiffs. The issue before the court was whether on a true construction of the agreement, Diversey was not entitled to claim as costs of their action, the professional fees paid. The plaintiffs argued that the agreement was clear and unambiguous and as Diversey had in its statement of claim pleaded the professional fees as a head of loss and damages, Diversey's claim for these two items had been subsumed as part of Diversey's overall claim for damages in the action, although these items could normally have been allowed as costs.

Diversey, on the other hand, argued that the agreement was ambiguous and extrinsic evidence on the circumstances leading up to the agreement should be referred to. In the alternative, Diversey argued that the court should apply either the 'purposive' test or the 'officious bystander test' or the contra proferentum rule. If the court disagreed that the agreement was ambiguous, Diversey argued that there was a mutual mistake and the court should accordingly rectify the agreement. Diversey also argued that its claim for professional costs paid was allowable as costs under the consent order and, until it was set aside, Diversey was entitled to enforce it by having its bill of costs taxed in the usual way.

**Held,** allowing the plaintiffs' application:

(1) The agreement was clear and unambiguous and accordingly the court cannot refer to extrinsic evidence in its construction of the agreement. The court need not adopt either the 'purposive' test or the test of 'an officious bystander' or the contra proferentum rule.

(2) The words 'claims in the suit' were clear and unambiguous. They mean what was claimed by Diversey in the action, ie injunctive relief, damages and costs. Since the disputed items in the bill of costs had been expressly pleaded and particularized in the statement of claim as special damages, they could not be recovered as costs in the action.

(3) The judgment order cannot be construed independently of the agreement.

(4) In the absence of evidence of a common mistake or that the mistaken assumption of Diversey had been communicated to the plaintiffs, the court will not rectify the agreement.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 52 of 1991.]

**Cases referred to**

1 *Prenn* v *Simmonds* [1971] 3 All ER 237 (folld)
2 *United Malayan Banking Corp Bhd* v *Tan Lian Keng & Ors* [1990] 1 MLJ 280 (refd)
3 *Haji Aminah bte Bakri* v *Manisah bte Haji Bakri & Ors* [1989] 1 MLJ 350 (refd)
4 *Doe & Ors* v *Biggs* 127 ER 1017 (refd)
5 *Manakee* v *Brattle* [1971] 1 All ER 464n (refd)
6 *MFI Properties Ltd* v *BICC Group Pension Trust Ltd* [1986] 1 All ER 974 (distd)
7 *Re Rothermere, Mellors Basden & Co* v *Coutts & Co & Anor* [1948] 1 All ER 709 (distd)
8 *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd* [1959] AC 576; [1959] 3 All ER 182 (distd)
9 *Associated Japanese Bank (International) Ltd* v *Credit du Nord SA* [1989] 1 WLR 255; [1988] 3 All ER 902 (distd)
10 *Pasuma Pharmacal Corp* v *McAlister & Co Ltd* [1965] 1 MLJ 221 (distd)
11 *Huddersfield Banking Co Ltd* v *Henry Lister & Son, Ltd* [1895] 2 Ch 273 (refd)
12 *'The Nai Genova'* [1984] 1 Lloyd's Rep 353 (refd)
13 *Olympia Sauna Shipping Co SA* v *Shinwa Kaiun Kaisha Ltd* [1985] 2 Lloyd's Rep 364 (folld)

**Legislation referred to**

Evidence Act (Cap 5, 1970 Ed) ss 93, 94

*Yeoh Lam Hock* (*Johnny Cheo* with him) for the plaintiffs.
*KS Lo* for the defendants.

*Cur Adv Vult*

**Goh Phai Cheng JC:** By an action filed in this court by way of Suit No 5626 of 1986 ('the action'), Diversey (Far East) Pte Ltd (hereinafter referred to as 'Diversey'), who are the defendants in this summons, claimed against the plaintiffs (ie Chester Chai and five others) for, inter alia, (a) injunctive relief to restrain the plaintiffs from using or divulging any trade secrets of Diversey; (b) trading or dealing with any trade suppliers who are suppliers of Diversey; and (c) damages for conspiracy to defraud or injure Diversey. A copy of the statement of claim filed by Diversey in the action is reproduced as exh 'CCCC-1' to the affidavit of Chester Chai Chung Ching filed on 5 February 1991 (hereinafter referred to as 'the Chester Chai affidavit') in this summons.

On 8 September 1989, just prior to the trial, the plaintiffs and Diversey reached an overall settlement of the dispute in the action. The terms and conditions of the settlement were contemporaneously reduced into writing in an agreement dated 8 September 1989 executed by the respective solicitors on behalf of Diversey and the plaintiffs (hereinafter referred to as 'the agreement'). A copy of the agreement is reproduced as exh 'CCCC-2' to the Chester Chai affidavit. Further on 11 September 1989, a consent judgment order was recorded by Justice Yong Pung How (as he then was). The said judgment order recorded most of the contents of the agreement. A copy of the said judgment order is reproduced as exh 'CCCC-3' to the Chester Chai affidavit.

Both the agreement and the judgment order provide that Diversey were entitled to taxed costs of the action on a party and party basis. Their bill of costs was duly presented and when it came up for taxation the following two items in the bill of costs were disputed by the plaintiffs:

(a) Item 639 in the bill for the recovery of the sum of $60,024 being the amount of the professional fees paid by Diversey to Messrs Coopers & Lybrand; and

(b) Item 649 in the bill for the recovery of the sum of $214.50 being the amount of professional fees paid to Commercial Trademark Services (Far East) Pte Ltd and Lionel Security Services Pte Ltd (collectively hereinafter referred to as 'CTS').

Diversey had inadvertently misstated in their bill of costs the professional charges paid to CTS as $214.50. This was incorrect and the amount paid to CTS was $57,136.44. At the taxation of the bill of costs, the plaintiffs objected in principle (whilst reserving their right to also object to the quantum) to the inclusion of these fees in the bill of costs. In this respect, two affidavits were filed — one by Eric Trimble, on behalf of Diversey on 2 January 1991 and the other by Chester Chai Chung Ching on behalf of the plaintiffs on 21 January 1991. Copies of these two affidavits are reproduced as exh 'CCCC-5' to the Chester Chai affidavit.

At the hearing of the taxation of the bill of costs on 25 January 1991, the learned assistant registrar, Mr Chan Hian Young, as the taxing master, directed that an application be taken out by the plaintiffs to determine the construction and ambit of the agreement with regard to the judgment order for the purpose of taxing Bill of Costs No 572 of 1990 presented by Diversey in the action. The plaintiffs therefore took out this summons to claim against Diversey for the following reliefs, namely:

(1) a declaration that upon a true construction of the agreement Diversey are not entitled to claim from the plaintiffs the professional fees paid by Diversey to Messrs Coopers & Lybrand and CTS with regard to the action;

(2) pursuant thereto, a declaration that items 639 and 641 of Diversey's Bill of Costs No 572 of 1990 filed with regard to the action be struck off;
(3) any further or other directions or orders as may be necessary for giving effect to the agreement and in particular with regard to Diversey's Bill of Costs No 572 of 1990 filed in the action; and
(4) costs.

I heard the application on 21 February 1991 and on 26 February 1991 I granted an order in terms of sub-paras (1) and (4) above. I also made the following additional order:

> ... a declaration that the defendants are not entitled to claim party and party costs in respect of items 639 and 641 of the defendants' Bill of Costs No 572/90 filed with regard to Suit No 5626 of 1986.

The defendants have appealed and I now give my reasons.

*Issues before this court*

Mr Yeoh, counsel for the plaintiffs, submitted that the issues before this court are:

(a) Whether the terms and conditions of the agreement are clear and unambiguous; and
(b) whether on a true construction of the agreement, Diversey are disentitled from claiming from the plaintiffs as costs of the action the professional fees paid by them to Messrs Coopers & Lybrand and CTS.

The issues before this court will therefore be determined by the construction which this court will place on two documents — the agreement and the judgment order. In my view, there is really one issue, namely, whether under the terms of the agreement Diversey are entitled to recover the professional fees paid by them to Coopers & Lybrand and CTS in the party and party bill of costs presented for taxation in the action. The preamble to the judgment order made it clear that it was a consent order made pursuant to the settlement reached by the parties.

*Preliminary ruling of law sought by the plaintiffs*

Mr Yeoh asked this court to make a preliminary ruling of law, namely, that for the purpose of construing the agreement and the judgment order the rule on parole evidence should be applied strictly. In other words, all earlier drafts and pre-agreement negotiations should be disallowed. He submitted that in the construction of a contemporaneous written agreement of compromise like the agreement, no oral evidence should be admitted to contradict, vary, add to or subtract from the terms thereof. He relied on ss 93 and 94 of the Evidence Act (Cap 5, 1970 Ed) ('the Act') and also illustrations (a) and (c) to s 94. Section 93 provides that where the terms of a contract have been reduced by the parties to the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself. Section 94 provides that no evidence of any oral agreement or statement as between the parties to any contract which has been reduced to the form of a document shall be admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms except as provided by that section.

Similarly, as the terms of the agreement are clear and unambiguous, Mr Yeoh submitted that evidence of negotiations preceding the agreement and earlier drafts of the agreement should not be admissible. He cited a passage from *Sarkar's Law of Evidence* (12th Ed) at p 785 which states that oral evidence of negotiations preceding a written contract is not admissible without first settling to what extent the contract was so ambiguous as to resort to such evidence. He also relied on para 802 of *Chitty on Contracts* (26th Ed) which states that where the parties have embodied the terms of their contract in a written document, the general rule is that parole evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify, the written contract and evidence is not admissible to show that the subjective intentions of the parties were not in accord with the written document executed by them.

Mr Yeoh also referred to the following passage in para 802 of *Chitty on Contracts* (26th Ed):

> *Extrinsic evidence inadmissible.* Where the parties have embodied the terms of their contract in a written document, the general rule is that 'verbal evidence is not allowed to be given ... so as to add to or to subtract from, or in any manner to vary or qualify the written contract'. This rule is often known as the parole evidence rule. Its operation is not confined to oral evidence, but extends to extrinsic matter in writing, such as drafts, preliminary agreements and letters of negotiation. Evidence is not admissible of negotiations between the parties, nor is it permissible to adduce evidence to show that their subjective intentions were not in accord with the written instrument. The rule applies to all contracts whether in writing or under seal, ...

Mr Yeoh also referred to the following dicta of Lord Wilberforce in *Prenn* v *Simmonds*[1] [as stated in the headnote]:

> Although in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the transaction.

Mr Yeoh cited the case of *United Malayan Banking Corp Bhd* v *Tan Lian Keng & Ors*[2] where the High Court of Malaysia held that [as stated in the headnote]:

(1) The Evidence Act 1950, by s 91, excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance with or in contradiction of or in addition to or in subtraction of the terms of a document.

(2) Even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construe the agreement.

(3) The effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss 91 and 92.

Mr Lo, counsel for Diversey, contended that extrinsic evidence is admissible under proviso (f) of s 94 and he cited the case of *Haji Aminah bte Bakri* v *Manisah bte Haji Bakri & Ors*[3] in support of his contention. In that case Chao Hick Tin JC (as he then was) held, inter alia, that the rule against parole evidence embodied in s 94 of the Act is not absolute and one of the exceptions is that any fact may be proved which shows in what manner the language of a document is related to existing facts. In my view, proviso (f) of s 94 of the Act does not allow any party to a written contract to refer to the prior negotiations and earlier drafts of the document. This proviso could be applied in the following manner as was suggested by Mr Yeoh. If A contracts with B for sale of Blackacre to B, evidence may be used to show where Blackacre is situated. That's the purpose for which the proviso is inserted. It does not allow parties to go behind the sale and refer to prior negotiations. I accepted Mr Yeoh's contention. I decided not to make the preliminary ruling sought by Mr Yeoh until I have heard the submissions of the parties on all points as regards the true meaning and intent of the agreement.

*The construction of the agreement*

Clause 1 of the agreement deals with the injunctive relief sought by Diversey. Clause 2 states that the first, second, third and sixth defendants in the action undertake to pay a sum of $400,000 to Diversey.

Clause 3 reads:

(a) The first, second, third and sixth defendants agree to pay to the plaintiffs their costs of the action, the same to be taxed if not agreed.

(b) The said defendants shall be entitled to set off against any sum due to the plaintiffs by way of costs, any photocopying charges incurred by the plaintiffs' solicitors in respect of documents requested by them from the defendants' solicitors as well as any sum due to the defendants in respect of any outstanding order for costs.

Clause 5 reads:

The plaintiffs will waive the photocopying charges incurred by the defendants' solicitors in respect of duplicate copies requested by them in the course of discovery in the suit.

It is not necessary for me to refer to cll 4 and 6 of the agreement for the purpose of this application.

Clause 7 of the agreement, which is the subject of lengthy submissions by counsel of the respective parties, reads:

In consideration of the mutual agreements and undertakings set out in this agreement:

(i) The plaintiffs in the suit unconditionally and irrevocably release and discharge the defendants in the suit, and each of them from any and all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof, including but not limited to the claims in the suit, *provided always* that nothing herein shall preclude the plaintiffs in the suit from initiating committal proceedings against the first, second and/or third defendants in the suit for breach at any time after 12 November 1986 of the terms of the order of court referred to in para 1 hereof; and

(ii) The defendants in the suit and each of them, unconditionally, and irrevocably release and discharge the plaintiffs from any and all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof.

I note that under cl 7, Diversey had agreed to release the plaintiffs in this summons (ie Chester Chai and five others) from 'all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof, *including but not limited to the claims in the suit*' (emphasis added by me).

What then are Diversey's 'claims in the suit'? Mr Yeoh contended that they include the two disputed items in the bill of costs. Diversey had elected to claim the professional fees of Coopers & Lybrand and CTS by pleading them as heads of loss and damage suffered by them in para 12 of their statement of claim. Diversey's claim for these two items had therefore been subsumed as, and they had throughout formed, part of Diversey's overall claim for damages in the action. Diversey's position on this had been consistent as the invoices for the professional fees for the two items and the reports were included in Diversey's list of documents and discovery was given on these items: see para 13 of the affidavit of Eric Trimble filed on behalf of Diversey on 14 February 1991 (hereinafter referred to as 'the ET affidavit'). The plaintiffs had entered into the agreement on the aforesaid basis and the payment of $400,000 pursuant to the agreement was in full and final settlement of all Diversey's claims, including the professional fees of Coopers & Lybrand and CTS which were pleaded in the statement of claim. It is clear from the language of the agreement that the professional fees of Coopers &

Lybrand and CTS are included in the agreement and Diversey cannot now claim these items by way of costs.

In para 12 of the statement of claim, the professional fees of Coopers & Lybrand and CTS were claimed by Diversey as distinct heads of special damages in the action. Clause 7(i) of the agreement states that in consideration of the payment of $400,000, Diversey unconditionally and irrevocably released and discharged the plaintiffs from 'any and all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof, including but not limited to the claims in the suit...'. Allowing Diversey to recover these items now as costs in the taxation would be tantamount to 'going behind' and totally disregarding the agreement. If the professional fees of Coopers & Lybrand and CTS were to be excluded from the agreement, then the agreement would have been drafted differently. For example, in the case of the photocopying charges (which were not referred to in the statement of claim) these were expressly provided for in cl 5 of the agreement. There was therefore no need for a specific reference in the agreement to the professional fees of Coopers & Lybrand and CTS as these were already pleaded by Diversey in their statement of claim and the plaintiffs had relied upon it.

On the construction of the agreement, Mr Lo contended that the agreement is clear and unambiguous. The relief sought in the action was a claim for injunction, damages and costs. The agreement dealt with the injunction, amount of compensation to be paid by the plaintiffs to Diversey and costs of the action. In exchange it also dealt with waiver of claims. In dealing with that, it clearly sought to waive all claims between the parties up to a certain cut-off date. That's because of the nature of the relationship of the parties. The stand of the plaintiffs was that if they were going to pay Diversey $400,000 by way of compensation and the injunction is to continue permanently and Diversey are to have the costs of the action, the plaintiffs are entitled to a waiver of all claims right up to a certain cut-off date. In that context, claims mean rights of action in respect of matters between the parties. The cut-off date was way after commencement of the action. Obviously the plaintiffs wanted to include claims in the action. Because of that, the phrase 'including but not limited to claims in the suit' was inserted into cl 7(i) of the agreement.

Mr Lo contended that cl 3(a) of the agreement comes first. It is clear and unqualified. In the construction of an agreement, unlike a will, the earlier words take precedence. In our instant case, it will be cl 1, then the $400,000 compensation and, thirdly, the provision on costs. He submitted that the costs provision is clear. Diversey are entitled to include the disputed items as costs in the suit. In support of his argument, Mr Lo referred to the following dicta of Mansfield CJ in *Doe & Ors* v *Biggs*[4] at p 1019:

> This case might be argued and considered for ever without advancing it all in law, reason, or precedent. But as it happens, in this will, the last words are, 'permit and suffer', which give the cestui que trust a legal estate; and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will give the legal estate to the party beneficially interested...

Applying that principle to our instant case, Mr Lo maintained that because cl 3(a) comes before cl 7(i) and cl 3(a) is clear and unqualified as to party and party costs, and since these two disputed items are normally allowed in party and party costs, Diversey are entitled to them. Items 639 and 641 are disbursements which would normally be allowed in party and party taxation subject to assessment.

According to Mr Lo, the words 'including but not limited to claims in the suit' in cl 7(i) mean rights of action in the suit. It does mean and is equated with claims described in the statement of claim. The parties were settling and the plaintiffs were eager to obtain a waiver in that suit. That phrase should be viewed in that context and when viewed in that way that phrase would mean including Diversey's rights of claim in the action. What are the defendants' rights of claim in the action? He submitted that it is the right to an injunction order, the right to claim damages in respect of the 'Revcon transactions' and the 'Protec conspiracy' and the right to the costs of the action. Claims for Coopers & Lybrand's and CTS's professional charges and the like are not strictly claims for damages. They are cost items. Even if this court was to equate claims in the suit to claims stated in the statement of claim, that cannot have the effect of turning essentially cost items into claims for damages.

If this court does not or is unable to construe in the way suggested by Mr Lo, then Lo maintained that there is an ambiguity or inconsistency in the provisions of the agreement on the question of whether Diversey are entitled to include items 639 and 641 in their party and party bill of costs, and this court is entitled to and ought to look to the surrounding circumstances leading to the agreement in order to ascertain the true intention of the parties on the said issue.

In my view, the words 'claims in the suit' in cl 7 are clear and unambiguous. They mean what is claimed by Diversey in the action, ie injunctive relief, damages and costs. Since the disputed items in the bill of costs had been expressly pleaded and particularized in para 12 of their statement of claim in the action, Diversey had in effect asked the court to award damages to compensate them for expenditure incurred by them as professional fees paid to Coopers & Lybrand and CTS. Damages are in effect a sum of money awarded by a court as compen-

sation for a tort or a breach of contract. Diversey, having asked the court in their statement of claim to award a sum of money to compensate them for the professional fees paid by Diversey to Coopers & Lybrand and CTS, cannot now say that these items were not included in the 'damages' sought by them in the action.

As for the construction of the agreement, the dicta of Lord Wilberforce in *Prenn* v *Simmonds*[1] at p 241 (reproduced earlier) has made it clear that I am entitled to look at the 'genesis' of the agreement, that is to say the statement of claim filed by Diversey in the action. To me, it is clear from the statement of claim filed in the action that Diversey sought to recover the fees of Coopers & Lybrand and CTS as special damages. Those fees, although they could be claimed as costs, cannot now be recovered as costs in the action if they had been included in the damages claimed in the action. In *Manakee* v *Brattle*,[5] the question was raised whether the fees of a witness, which included expenditure that could have been claimed as damages in an action but were not included in the damages claimed, can be claimed instead as costs. Mocatta J held that he could see no reason why they should not be, so long as they have not been included in the damages claimed.

Having reached the conclusion that the terms of the agreement do not allow Diversey to recover the disputed cost items in their party and party bill of costs, I accordingly rejected Mr Lo's contention that if I am unable to construe the agreement in the manner described by him, then there is an ambiguity or inconsistency in the provisions of the agreement on the disputed cost items and I ought to look at the surrounding circumstances leading to the agreement in order to ascertain the true intention of the parties on the said issue. There is also no necessity for me to do so as the terms of the agreement are clear and unambiguous. Furthermore s 93 of the Act provides that when the terms of a contract have been reduced by the parties to the form of a document, no evidence may be given in proof of the terms of such contract except the document itself and s 94 excludes the admissibility of extrinsic evidence being adduced by the parties thereto for the purpose of contradicting, varying, adding to, or subtracting from its terms. The pre-contract negotiations and the drafts of the agreement are not admissible under proviso (f) of s 94 of the Act.

*Should the agreement be given a purposive construction?*

Mr Lo asked this court to give the agreement a purposive construction and to have regard to the fact that the agreement was an amicable out of court settlement by the parties. The plaintiffs had agreed to pay $400,000 as compensation in lieu of damages. The plaintiffs had also agreed to pay the party and party costs of the action. Diversey had agreed to waive all claims, meaning all rights of action against the plaintiffs up to a certain date including the claims in the suit. Mr Lo's contention was that 'claims in the suit' should be construed to mean rights of action in the suit. In the context of the action, it means the claims for injunction, damages and costs. According to him, it would be in accordance with the apparent commercial purpose of the agreement to construe the phrase 'claims in the suit' as meaning claims for damages in the suit. It follows that 'claims in the suit' cannot include the Coopers & Lybrand's and CTS's fees since they are cost items and would not properly be claimed as damages in the suit. He cited the case of *MFI Properties Ltd* v *BICC Group Pension Trust Ltd*[6] in support of his contention. In my view it is not correct to give the agreement a purposive construction when its terms are clear and unambiguous. The court in the *MFI Properties Ltd* case[6] adopted a purposive construction because the rent review clause in the lease which was being considered by the court was reasonably capable of bearing more than one meaning. It was for that reason that the court held that it was entitled to have regard to the context and commercial purpose of the clause when choosing one meaning in preference to the other.

Mr Lo also cited the case of *Re Rothermere, Mellors Basden & Co* v *Coutts & Co & Anor*[7] where the court held that if there is an inconsistency and there are two possible approaches, the court will choose the one which will not lead to absurdity. Here again, I must emphasize that the phrase which the court had to construe in the *Re Rothermere* case[7] was capable of two constructions. In our instant case the terms of the agreement are clear and unambiguous and it leads to only one conclusion, namely, that Diversey's claim for the Coopers & Lybrand's and CTS's charges have been included in the $400,000 payable as compensation to Diversey.

*The test of the 'officious bystander'*

Mr Lo's next contention is that in the construction of the agreement, the court should use the test of the officious bystander in order to infer an implied term. If somebody at the meeting at which the agreement was concluded was asked whether the words 'including the charges of Coopers & Lybrand and CTS' should be added to cl 3(a), Mr Lo maintained that both parties at that time would have answered 'yes, of course'. He referred to the cases of *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd*[8] and *Associated Japanese Bank (International) Ltd* v *Credit du Nord SA*[9] where the courts applied the test of the officious bystander. He also cited *Pasuma Pharmacal Corp* v *McAlister & Co Ltd*[10] where Thomson LP examined the authorities on warranties implied by law by using the test of the officious bystander. All these cases which have been cited by Mr Lo do not in my view have any bearing on our instant case

where the terms of the agreement are clear and unambiguous. In *Sze Hai Tong Bank*'s case,[8] the court was asked to construe a clause in a bill of lading which seeks to exempt a carrier from liability for loss or damage to goods and the court used the officious bystander test to limit the operation of that clause. The *Associated Japanese Bank (International) Ltd* case[9] dealt with a contract of guarantee which the court held was void ab initio because the machines, the subject of the guarantee did not exist.

*The contra proferentum rule*

Mr Lo also urged this court to apply the contra proferentem rule when attempting to ascertain the meaning of the words 'claims in the suit' in cl 7(i) of the agreement because that clause (which appeared in a draft of the agreement prepared by Diversey's solicitors) had been revised by the plaintiffs' solicitors. The first draft of the agreement was prepared by Diversey's solicitors. The plaintiffs' solicitors amended the draft by inserting a new cl 7(i): see exh 4 to the ET affidavit. If there is any ambiguity, Mr Lo contended that the contra proferentum rule requires this court to construe that clause against the plaintiffs. If I were to apply the contra proferentum rule to the instant case in the manner suggested by Mr Lo then I will have to ask myself which party drafted which clause of the agreement. This, in my view, cannot be the correct approach which I am required to take under the contra proferentum rule.

*Can the agreement be construed in favour of the plaintiffs without the judgment order being set aside?*

Mr Lo contended that unless and until the judgment order is set aside by the plaintiffs (and no reason or basis has been put forward by the plaintiffs why it should be set aside), Diversey are entitled to enforce it and have their bill of costs taxed in the usual way and that would include Coopers & Lybrand's and CTS's charges. An order of court can be set aside on the same ground an agreement can be set aside, for example, fraud, misrepresentation, etc. Mr Lo contended that the judgment order is clear on the question of costs. It says the plaintiffs to pay 'costs of the action, the same to be taxed if not agreed', and that reinforces his strict interpretation of the agreement. If he were wrong on this argument, then it is his contention that the plaintiffs will have to set side the judgment order and for them to do so the plaintiffs would have to show that there was a mistake in the judgment order concerning costs. The stand which the plaintiffs have taken is that if they succeed on the construction of the agreement, then they need not pay the disputed cost items in the party and party bill of costs notwithstanding the terms of the judgment order. That, he submitted, cannot be correct and that this court in deciding this matter should give directions as to how this issue is to be dealt with. Otherwise, the parties will find themselves in a situation where this court construes the agreement against Diversey while the judgment order remains intact and valid but enforceable.

I do not accept Mr Lo's contention that unless and until the plaintiffs set aside the judgment order, Diversey are entitled to the two disputed items even if this court construes the agreement in the plaintiffs' favour. The two disputed items were treated as damages in Diversey's statement of claim and have therefore been subsumed into cl 7(i) of the agreement. The plaintiffs have been released from all claims of Diversey. The judgment order and the agreement must be read together and therefore those two items fall outside the ambit of the word 'costs' in the judgment order and in the agreement. Furthermore, the preamble of the judgment order stated very clearly that it is a consent order made pursuant to a settlement reached between the parties on 8 September 1989. Lord Wilberforce in *Prenn* v *Simmonds*[1] has made it clear that I am entitled to look at the agreement since it is the 'genesis' of the judgment order. Furthermore, cl 5 of the agreement has made it clear that Diversey is not entitled to claim the photocopying charges as cost items in the action. This clause was not embodied in the judgment order. It is also clear that such charges should normally be allowed in a party and party bill of costs. Diversey had included the photocopying charges as an item of costs in their bill of costs and it was withdrawn when their attention was drawn to the terms of the agreement. Clearly both the agreement and judgment order must be read together. It is incorrect for Mr Lo to say that the judgment order has a life of its own.

*Rectification of the agreement on the basis of a mistake*

Mr Lo also contended that there is a common mistake between the parties and the court has the jurisdiction and power to rectify the mistake. In the instant case, even if the terms of the agreement are clear, a party is entitled to say that there was a mistake and the mistake could be a common mistake or a unilateral mistake. If a party says that, then in an originating summons this court would have to give directions as to how the issue should be dealt with and that includes giving directions as to whether evidence on the alleged mistake should be dealt with by parole evidence or affidavit evidence with cross-examination of the deponents of the affidavits. He referred to the case of *Huddersfield Banking Co Ltd* v *Henry Lister & Son, Ltd*[11] for the court's jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties. In support of his contention Mr Lo also relied on the following passage in *'The Nai Genova'* case[12] at p 359:

The relevant authorities relating to rectification

In principle, the remedy of rectification is one permitted by the court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by mistake in verbal expression, does not accurately reflect their true agreement. It follows that the general rule is that rectification will not be granted unless there has been a mistake in verbal expression *common to all parties*.

...

As the law stands, the conditions which must be satisfied if rectification is to be granted on the grounds of common mistake may, in my opinion, be summarized as follows:

First, there must be a common intention in regard to the particular provisions of the agreement in question, together with some outward expression of accord. Secondly, this common intention must continue up to the time of execution of the instrument. Thirdly, there must be clear evidence that the instrument as executed does not accurately represent the true agreement of the parties at the time of its execution. Fourthly, it must be shown that the instrument, if rectified as claimed, would accurately represent the true agreement of the parties at that time: (see generally *Snell's Equity* (28th Ed) (1982) at pp 612-614).

The standard of proof required in an action of rectification to establish the common intention of the parties is the civil standard of balance of probability. Nevertheless, parties who append their signature to a written instrument prima facie indicate, by the very fact of their signatures, their assent to all the terms contained in it. In these circumstances ... as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself ... [see *Thomas Bates* v *Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at p 521 per Lord Justice Brightman].

Such, therefore, are the fairly stringent requirements which a plaintiff must satisfy if he is to succeed in establishing a claim to rectification on the grounds of common mistake.

Mr Lo also referred to paras 9, 10 and 11 of the affidavit of Eric Trimble filed on 14 February 1991 to show that:

(a) during the negotiations on 7 and 8 September 1989, both parties regarded the monetary compensation as compensation for Diversey's claim for damages arising from the Revcon transactions and the Protec conspiracy and that these were the claims in the action which were intended to be waived by the agreement;

(b) the professional charges of Coopers & Lybrand and CTS never featured in the negotiations and both parties had assumed that they would come under the costs provision in the agreement; and

(c) the said professional charges (then and as it is now the case) would be regarded as items which would normally be allowed in party and party taxation subject to their proper quantum being assessed.

Accordingly, if, contrary to the defendants' contention, this court should regard the words 'the claims in the suit' in cl 7(i) of the agreement as including the said professional charges, Mr Lo submitted that this court should in the interests of justice and equity rectify the agreement in such a way as to give effect to the common intention of the parties and this could be done by inserting a proviso to cl 7(i) such as 'provided that the charges of Coopers & Lybrand, CTS and Lionel Security Services shall form part of the defendants' costs in the action'.

Mr Lo submitted that having regard to the nature of the dispute (ie to determine whether the two items of professional charges are to be included in the party and party bill of costs), evidence of what took place between the parties' respective solicitors from 2 September 1989 onwards would be relevant and useful and, if he were wrong on that, then what took place on 8 and 9 September 1989 would be relevant as existing facts for the purpose of proviso (f) of s 94 of the Act.

The plaintiffs' counsel, Mr Cheo, submitted that proviso (f) of s 94 of the Act does not allow the parties to refer to prior negotiations and earlier drafts of the agreement. He also cited the following passage from *Sarkar's Law of Evidence* (12th Ed) at p 804:

As to correction of clerical or arithmetical mistakes in judgments, decrees, etc see s 152 CP Code.

(1) Individual mistake not known to or induced by the second party . Where a jural act is executed by *signing* a specific and *complete* document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequences plainly requires this result. That the signer did not intend to execute such terms is immaterial, and whether the lack of intent was due to a *failure to read it over*, or to some other cause, is immaterial. In other words, his individual innocent mistake or deliberate secret dissent cannot be shown. Such may be taken to be the general rule. As exceptions to the rule, there may be two classes of cases: (i) Where a document was drafted and *prepared by the second party*, and contains also parts which physically constitute virtually *a separate document* and are not included in the scope of the first party's signature, it may be proper, in order to protect against imposition, to exonerate him if he misunderstood the extent of the terms to which his signature applied.

...

(2) Individual mistake known to or inducted by the second party. Where the party's error as to the contents of the signed documents is *known to the second party*, the first party may, of course, by the general principle insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter. (i) The ordinary instance is that of *fraudulent misrepresentations of the document's terms* by the second party; and, in particular, a false reading to a person *illiterate, blind, or alien.* (ii) Where the first party's error is merely *known* to the second party, *without fraudulent means* by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him;...

(3) Mutual mistake. (i) Concerning mutual mistake and its effect on the terms of the jural act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake — including individual mistake — will suffice *to bar a bill for specific performance* is a distinct one; it involves merely the choice of remedies, not the terms of the valid act. In the next place, the question whether an act may be avoided for a *mistaken assumption of fact external to the contract*, is a distinct one; belonging to the principle of avoidability [see ss 20, 21, 22 Contract Act].

Mr Cheo also cited *Olympia Sauna Shipping Co SA* v *Shinwa Kaiun Kaisha Ltd*[13] which held that, unless a party is able to show a mistake common to both parties, the court will not order any rectification of an agreement between the parties and, in the case of a unilateral mistake, the court held that no rectification will be ordered unless the party seeking the rectification satisfy certain stringent conditions which are:

(a) that party seeking rectification must show that he mistakenly believed the written instrument to be an accurate expression of their bargain with the non-mistaken party when in truth it was not;
(b) the non-mistaken party had actual knowledge of the mistaken party's mistake at the time the agreement was made;
(c) the non-mistaken party's conduct must be shown to be unconscionable so as to lead equity to intervene.

On this point of mutual mistake, I find that the allegations in the relevant paragraphs of the affidavit of Eric Trimble do not show that the mistaken assumption of Diversey was communicated to the plaintiffs or that the plaintiffs shared their view. Having regard to the evidence in the said affidavit of Eric Trimble and the authorities cited above, I concluded that this is not a proper case for this court to give the directions sought by counsel for Diversey for the rectification of the agreement on the ground of mistake.

Accordingly, for the reasons given above, I made the following declarations on 26 February 1991:

(a) that upon a true construction of the agreement Diversey are not entitled to claim from the plaintiffs the professional fees paid by Diversey to Messrs Coopers & Lybrand and CTS with regard to the Action; and
(b) that the defendants are not entitled to claim party and party costs in respect of items 639 and 641 of the defendants' Bill of Costs No 572/90 filed with regard to Suit No 5626 of 1986.

I also awarded the plaintiffs the costs of this application.

*Order accordingly.*

Solicitors: *Shook Lin & Bok; Allen & Gledhill.*

Reported by *Rosalind Tan*

# Teng Meow Chong v Chia Ngim Fong & Anor

HIGH COURT (SINGAPORE) — MOTION IN SUIT NO 1277 OF 1990
THEAN J
25 APRIL 1991

*Unincorporated Associations — Registration of business — Whether there has been change in constitution of business or management thereof — No report to registrar — Whether an infringement of Business Registration Act (Cap 32, 1985 Ed) — Business Registration Act (Cap 32, 1985 Ed), ss 12 & 17(1)*

*Civil Procedure — Injunction — Infringement of statute — Whether court can grant injunctive relief to enforce such arrangement pending trial — Equity cannot assist*

The first and second defendants as husband and wife had, prior to 1980, been carrying on the business of a department store under the name and style of 747 Departmental Store at Block 12, Haig Road, #01-327, Singapore 1543. The business was not successful and having incurred considerable debts, negotiations were entered into between the plaintiff and the defendants with a view to the plaintiff taking over the business. A contract dated 20 February 1980 was entered into between the plaintiff and the first defendant to the effect that the plaintiff would settle the outstanding debts and take over payment of the rental and PUB charges in respect of the premises in return for use of the premises, free from interference, to conduct business under the name of 747 Departmental Store. No return was filed with the Registry of Businesses reflecting the arrangement entered into and the business continued to be registered solely in the name of the first defendant.

This arrangement continued for ten years until the first defendant notified the plaintiff in January 1990 or thereabouts of his intention to terminate it. This was objected to by the plaintiff and a dispute arose. The first defendant proceeded to terminate the registration of the business on 8 February 1990, and, on 27 March 1990 the defendants registered a new business under the name and style of 747 Lucky Store at the same premises.

The defendants locked up the premises preventing the plaintiff from carrying on business. The plaintiff obtained an ex parte injunction restraining the defendants from 'locking, padlocking, welding or otherwise obstructing the carrying on of the business at Block 12, Haig Road, #01-327, Singapore 1543 and parting with, selling, charging or in any way disposing of the goods and merchandise stored at the said premises' and applied to have the injunction continued. The defendants took out a notice of motion seeking an interlocutory injunction restraining the plaintiff from entering and continuing in occupation of the premises.

**Held**, refusing the plaintiff's motion for continuation of the ex parte injunction and granting the defendants' motion:

(1) The nature and effect of the arrangement between the plaintiff and the first defendant could be construed either as one under which the plaintiff became the manager of the business while the proprietary interest in the business remained vested in the first defendant, or, alternatively as one whereby the plaintiff became de facto the sole proprietor of the business taking it over entirely from the first defendant. On either view of the transaction, there was an infringement of the provisions of the Business Registration Act (Cap 32, 1985 Ed) ('the Act').